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No. 85-1705

IN THE

Supreme Court of the United States

October Term, 1985

CLARENCE FELDER *Petitioner,*

v.

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA and HORACE HAMILTON *et uxus,*
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Ninth Circuit's holding that Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), may be applied retroactively to lengthen the otherwise applicable statute of limitations in a hybrid § 301 cause of action conflict with other Circuits?

2. Does the Ninth Circuit's holding that unions and employers should be governed by the same limitation period in a hybrid § 301 action conflict with other Circuits?

LIST OF PARTIES

Respondents adopt the statement of Petitioner.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

LEGAL ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI 2

A. The Instant Case Does Not Create a Conflict Among the Circuits with Respect to the Retroactivity of Del Costello . . 2

B. The Ninth Circuit's Reference to the Appropriate State Statute of Limitations Governing Petitioner's Action Does Not Create a Conflict with the Decision of Another Federal Court of Appeals on the Same Matter 5

C. The Facts of This Case Require Denial of the Petition for Certiorari . . 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases — Page

Aragon v. Federated Department Stores, Inc., 750 F.2d 1447 (9th Cir., 1985), cert. den., 106 S.Ct. 229, 88 L.Ed.2d 229 (1985) 6, 9, 10

Barina v. Gulf Trading & Transportation Co., 726 F.2d 560 (9th Cir., 1984) 7

Buscemi v. McDonnell Douglas Corp., 736 F.2d 1348 (9th Cir., 1984) 7

Del Costello v. International Brotherhood of Teamsters, 468 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) . . . . . i, 2, 3, 4, 9, 10

Edwards v. Teamsters Local 36, 719 F.2d 1036 (9th Cir., 1983), cert. den., 465 U.S. 1102, 104 S.Ct. 1599 (1984) 10

Glover v. United Grocers, Inc., 746 F.2d 1380 (9th Cir., 1984), cert. den., 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985) 6, 9, 10

Jones v. Consolidated Freightways Corp. of Delaware, 776 F.2d 1458 (10th Cir., 1985) 4

McNaughton v. Dillingham Corp., 707 F.2d 1042 (9th Cir., 1983 . . . . . 5, 6

Scoggins v. Boeing Co., 742 F.2d 1225 (9th Cir., 1984) 7

Singer v. Flying Tiger Lines, Inc., 652 F.2d 1349 (9th Cir., 1981) 5, 6, 7, 8

Smith v. General Motors Corp., 747 F.2d 372 (6th Cir., 1984) 3

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CLARENCE FELDER, Petitioner,

v.

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA and HORACE HAMILTON, et uxus, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Respondents, Seafarers' International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, and Horace Hamilton,

et uxus, respectfully submit the following Opposition to Petitioner's request for a writ of certiorari.

OPINIONS BELOW

Respondents adopt the statement of Petitioner.

JURISDICTION

Respondents adopt the statement of Petitioner.

STATUTES INVOLVED

Respondents adopt the statement of Petitioner.

STATEMENT OF THE CASE

Respondents adopt the statement of Petitioner.

LEGAL ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

A. The Instant Case Does Not Create a Conflict Among the Circuits with Respect to the Retroactivity of Del Costello.

Petitioner contends that the Ninth Circuit's decision in the

instant case creates a conflict in the various circuits as to the retroactive application of Del Costello v. International Brotherhood of Teamsters, 468 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). The Ninth Circuit's decision, however, creates no conflict on this issue.

The Ninth Circuit's decision that Del Costello may be applied retroactively does not conflict with the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits. Those circuits have all held that Del Costello should be given retroactive effect. Smith v. General Motors Corp., 747 F.2d 372, 374 (6th Cir., 1984).

Nor does the Ninth Circuit's

decision conflict with the Tenth Circuit's decision in Jones v. Consolidated Freightways Corp. of Delaware, 776 F.2d 1458 (10th Cir., 1985). The Jones case only precludes the retroactive application of Del Costello if the effect is to shorten the otherwise applicable state limitation period. In the instant case, the Ninth Circuit ruled that Del Costello could be given retroactive effect since retroactivity would only serve to lengthen the applicable state limitation period governing Petitioner's action; the limitation period governing Petitioner's action would be increased from the 3-month period under RCW 7.04.180 to the 6-month limitation period under Del Costello.

B. The Ninth Circuit's Reference to the Appropriate State Statute of Limitations Governing Petitioner's Action Does Not Create a Conflict with the Decision of Another Federal Court of Appeals on the Same Matter.

The Ninth Circuit in the instant case ruled that a hybrid § 301 action against a union alleging breach of the duty of fair representation which accrued after Singer v. Flying Tiger Lines, Inc., 652 F.2d 1349 (9th Cir., 1981)(decided August 13, 1981), and before McNaughton v. Dillingham Corp., 707 F.2d 1042 (9th Cir., 1983)(decided June 7, 1983), would be determined under RCW 7.04.180. Petitioner's cause of action accrued in either December, 1981 or April, 1982.

RCW 7.04.180 sets a 3-month limitation period for actions to vacate an arbitration award. The Ninth Circuit's decision to

establish a window period between the Singer and McNaughton cases in which this limitation period governs confirms the same court's decision in Aragon v. Federated Department Stores, Inc., 750 F.2d 1447 (9th Cir., 1985), cert. den., 106 S.Ct. 229, 88 L.Ed.2d 229 (1985), and Glover v. United Grocers, Inc., 746 F.2d 1380 (9th Cir., 1984), cert. den., 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985).

The Singer decision put plaintiffs in a hybrid § 301 action against a union on notice that the same limitation period would govern against both unions and employers. The Ninth Circuit further concluded that the applicability of Singer's limitation period to a union did not

depend upon whether the § 301 action followed an arbitration award. The Ninth Circuit noted that for § 301 suits against employers, the court has applied the Singer rule whether or not the action follows arbitration. See Scoggins v. Boeing Co., 742 F.2d 1225, 1228, n.3 (9th Cir., 1984); Buscemi v. McDonnell Douglas Corp., 736 F.2d1348, 1351 (9th Cir., 1984); Barina v. Gulf Trading & Transportation Co., 726 F.2d 560, 561, n.1 (9th Cir., 1984).

Whether there is an arbitration award or the union refuses to arbitrate a grievance, in both cases a duty of fair representation plaintiff is attempting to resurrect a grievance laid to rest under the

contractual grievance procedure. The Ninth Circuit in the instant case has realigned the limitation periods applicable to unions and employers in such situations to ensure that both are under a uniform limitation period.

Petitioner alleges that the Ninth Circuit's decision is in conflict with other circuit decisions. Petitioner, however, fails to reveal any conflict with other circuits resulting from the Ninth Circuit's holding that Petitioner's action is governed by RCW 7.04.180 in the window period following Singer, and that this limitation period is applicable whether or not the suit follows an

arbitration award. This case, as did the Aragon and Glover decisions, establishes a logical consistency within the Ninth Circuit in applying the same limitation period for actions against employers and unions which accrued prior to Del Costello. The decision brings order to an acknowledged state of prior disarray on the issue in the Ninth Circuit. The decision does not create a continuing conflict with any other circuit decision.

C. The Facts of This Case Require Denial of the Petition for Certiorari.

The Supreme Court has consistently denied certiorari of cases arising out of the Ninth Circuit involving the Del Costello

retroactivity issue. Edwards v. Teamsters Local 36, 719 F.2d 1036 (9th Cir., 1983), cert. den., 465 U.S. 1102, 104 S.Ct. 1599 (1984); Glover, supra, cert. den., 105 S.Ct. 2357, 86 L.Ed.2d 258; Aragon, supra, cert. den., 106 S.Ct. 229, 88 L.Ed.2d 229. There is no issue distinguishing the instant petition for certiorari from the above cases. Passage of time will shortly moot any controversy as to the appropriate statute of limitations in the Ninth Circuit for hybrid § 301 actions against a union which accrued prior to Del Costello. There is no vital question of federal law posing a continuing controversy here.

CONCLUSION

Based upon the foregoing discussion, Respondents respectfully requests the United States Supreme Court to deny the petition for certiorari.

Respectfully submitted,

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